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No. 82-1579

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,
and
STATE OF MINNESOTA,
Appellant/Intervenor,
v.
CHICAGO, NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARKANSAS DELAWARE, IDAHO, IOWA, KANSAS, LOUISIANA, MICHIGAN, NEW JERSEY, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WASHINGTON, WISCONSIN AND WYOMING, IN SUPPORT OF APPELLANT AND APPELLANT/INTERVENOR

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INTEREST OF THE AMICI CURIAE

The amici states have two distinct but overlapping interests.

First, as sovereign states they have an interest in preserving the right of eminent domain as an essential attribute of their sovereignty.

Second, several states have committed resources to the restoration of rail service on lines abandoned under the authority of the federal government. See Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149, 1167-68 nn. 33-40 (7th Cir. 1981), cert. denied, 102 S. Ct. 1632 (1982) (dealing with programs active in South Dakota, Washington, and Wisconsin). Iowa acquires property by eminent domain for use as a railway, IOWA CODE sec. 471.6 (1983), and specifically does so for the "preservation of abandoned railroad right of way for

future railroad use." IOWA CODE sec. 471.9 (1983). Wisconsin acquires abandoned rail property by eminent domain for "future transportational, recreational or scenic purposes." Sec. 85.09(2), Wis. Stats. (1981-82). Minnesota empowers foreign and domestic rail corporations to acquire by eminent domain property necessary for rail purposes. Sec. 222.27, Minn. Stats. (1982). The Court of Appeals' decision presents a serious setback to these programs. It forecloses all states from acquiring abandoned rail property by eminent domain. Thus, an essential tool for providing necessary services is frustrated.

ARGUMENT

Congress Did Not Preempt Post-Abandonment State Eminent Domain

A. The presumption is against preemption

On its face, ousting states of their eminent domain sovereignty is a matter of the highest importance in federal-state relations.

The Solicitor General describes this case as "involv[ing] delicate questions of federalism." (Jur. St. Ap. 30.) The ICC General Counsel describes it as involving a "significant Tenth Amendment issue because [the holding below] interferes with the State's choice of purposes for which it authorizes use of an integral governmental function -- the power of eminent domain." (Id. at 59.)

This Court assumes that the historic powers of the states are not superseded by federal legislation, absent clear and

manifest contrary purpose of Congress. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). The power of eminent domain is such an historic power. It is "traditionally associated with sovereignty." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974). The power is "inalienable" and an "essential attribute of sovereignty ... . Without it, the state cannot be a state." Nichols, The Law of Eminent Domain, sec. 1.141[3] (3d ed. 1981).

The Court of Appeals' decision, read narrowly, would permit condemnation of abandoned rail property for recreational or scenic purposes, or to build a highway. But the foreclosure of eminent domain to preserve intrastate rail service is an unprincipled distinction that invades the prerogatives of a sovereign state to choose. As will be

seen, it frustrates federal interests as well.

The holding creates a void in the Republic, whether read narrowly or broadly. The federal government has authorized abandonment of rail service in a small part of Minnesota at the behest of a private entrepreneur who cannot make a financial go of it. The Eighth Circuit now concludes that states are impotent to meet the local rail need in futuro because of federal abandonment. Local rail preservation programs are devastated by this ruling, because abandonment creates the local need for restoration.

Accordingly, it must be presumed that Congress did not intend to divest the states of this historic attribute of their sovereignty, eminent domain, to fulfill public purposes.

B. The federal and state programs are in harmony

The Court of Appeals made three errors in analysis: (1) it neglected to attempt to harmonize state and federal law; (2) it failed to appreciate that Congress encourages local programs like Minnesota's to revive rail service in the wake of the hemorrhaging abandonments throughout the interstate rail corridors; and (3) it saw state-federal conflicts where none exist because it did not discern the complementary nature of the two programs.

One can agree with the court, at least arguendo, that a state rail preservation program must not stand as an obstacle to the federal program. But one still can insist on the court's duty to attempt to find harmony between the two programs. See Merrill Lynch, Pierce,

Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

The laws are in harmony. Congress has fostered state restoration of local service to replace federally abandoned rail lines. The "collapse of several major carriers necessitated a substantial federal effort to ensure continuation of vital service." Simmons v. I.C.C., 697 F.2d 326, 328 (D.C. Cir. 1982). This effort included "encouraging states to become involved in the preservation of local rail service." Id. Through subsidies and other means, the "congressional policy ... plac[es] the states at the forefront of the federal effort to preserve local rail service." Id. at 329. Because of state involvement after abandonment, the ICC acknowledged "it lacked jurisdiction to regulate state acquisition of an abandoned rail line,

since by the process of abandonment the line lost its status as rail property." Id. at 331.

Although federal jurisdiction is lacking as to state acquisition of an abandoned line, Commission jurisdiction awakens once operation of the line resumes. Id. But states were exempted from many of the ICC start-up rules in order to "remove obstacles that might prevent state acquisition of abandoned rail lines." Id. at 332.

Thus, federal policy is served only by encouraging state acquisitions of abandoned rail property. The lower court's failure to understand this was its basic flaw.

Title 49 U.S.C. sec. 10905 concerns the process of abandonment, not subsequent acquisition. It only "postpone[s]" the abandonment date on

receipt of an offer of financial assistance. It is a tool to avoid abandonment, not a solution after abandonment. Whatever state powers may be preempted prior to abandonment, the ICC holds that once the "rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction." Common Carrier Status of States, 363 I.C.C. 132, 135 (1980). The Court of Appeals, however, felt there was a federal interest apart from ICC jurisdiction, 693 F.2d at 824, to which the ICC subsequently responded, with specific reference to the decision under review, that "federal interest and Commission jurisdiction end" once abandonment is complete. Chicago and North Western Transp. Co. -- Abandonment in Waukesha, Jefferson, and Dane Counties, Wisconsin,

Docket No. AB-1 (Sub-No. 144 (May 5, 1983)) (emphasis added). Accord, Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665, 667 (7th Cir. 1982) (the eminent domain power could await "till the line was abandoned").

The Eighth Circuit did not appreciate the cooperative federalism erected by Congress: the ICC controls the abandonment process; the states are encouraged to then take over to revive local rail service.

Lacking this perception of the overall federal scheme, the Court of Appeals saw conflicts where none exist.

The court saw a conflict from delay caused by eminent domain proceedings. But post-abandonment condemnation does not delay the abandonment. Congress shortened the ICC abandonment process from six months to about 110 days for two

reasons. One purpose was to protect carriers from efforts to "tediously extend the abandonment process." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980). This quote refers to the previous six months at the ICC, not a subsequent state condemnation. Accord, Chicago & North Western Transp. Co. v. U.S., 582 F.2d 1043, 1049 (7th Cir.) cert. denied, 439 U.S. 1039 (1978) (Congress determined "to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance."). State condemnation, of course, does not extend abandonment proceedings; it operates ony after their completion.

Congress' second purpose in abbreviating the six months was to protect states from carrier gouging. The six-month period "enabled a railroad to

hold out for a price that would reflect at least some of the value of continued rail service." Chicago and North Western Transp. Co. v. U.S., 678 F.2d 665, 667 (7th Cir. 1982). Congress did not want this power in railroads, and "[t]hat is why it amended section 10905 in 1980 to allow -- indeed require -- the Commission to fix the price of the sale if the parties could not agree." Id., at 668. The purpose of protecting states is not frustrated by allowing condemnation.

The court also saw a conflict in using condemnation as a price setting mechanism after invocation of the price setting mechanism in sec. 10905. First, however, this "conflict" at best would foreclose the 10905 offeror from using state condemnation, perhaps on a waiver theory. It hardly warrants the court's sweeping conclusion that the mere

existence of sec. 10905 jettisons any post-abandonment condemnation, regardless of whether 10905 had been invoked or whether the condemnor and 10905 offeror were one and the same. Second, sec. 10905 expressly empowers the offeror to walk away from the ICC price; only the carrier is bound. 49 U.S.C. sec. 10905(f)(2). Since Congress expressly refrained from binding the offeror, the court should not do so even on a waiver theory, much less under the guise of a preemption analysis. Third, the purpose in binding the carrier was not to save it from condemnation or to terminate acquisition efforts, but was to exact a quid pro quo for the accelerated process. As accelerated, the carrier can reduce the losses on an unprofitable line, but it is bound by the price. See Chicago, 678 F.2d at 671. While the

offeror can yet choose condemnation, it must suffer the lost service in the interim. Fourth, different valuation factors arise in a condemnation that may make the price lower or higher. See Opinion of ICC General Counsel. (Jur. St. Ap. 46, esp. n. 3).

Finally, the court saw a conflict from state law because of the detailed procedure in 10905. However, as the ICC Office of Proceedings noted, 10905 sets forth "an extensive statutory plan for such sales before abandonment becomes effective, but there is nothing in the statute to suggest a federal interest in the property once abandonment is consummated." (Jur. St. Ap. 55.) (Emphasis in original.)

C. The decision frustrates federal interests

By foreclosing state eminent domain acquisitions of abandoned rail property, the Eighth Circuit frustrates the congressional policy to place the states at the forefront of restoring service in this depression-plagued industry.

The ICC General Counsel has noted the federal funding programs designed to instigate state activity. (Jur. St. Ap. 15.) Also see Simmons, 697 F.2d at 328-29. The Eighth Circuit decision stymies use of the funds. Further, the decision has "foreclosed one important means by which states may help to continue rail service." ICC General Counsel. (Jur. St. Ap. 59.)

D. The decision has absurd consequences

Since abandoned railroads often lie fallow for months or years, the Eighth Circuit decision means the states could not condemn even after that dormancy. Moreover, since preemption is a jurisdictional matter, a state could not condemn even if the carrier agreed such procedure was the best price-setting mechanism. Indeed, even with a dozen intervening private owners, 10905 so runs with the land, under the ruling even beyond the twenty-first century, that the state could not condemn for rail purposes -- ever.

Further, if abandonment under 10905 preempts state law afterwards, how can the railroad sell the property if not pursuant to state law? If the federal interest continues, how can it be sold even if state recording laws, etc.,

otherwise apply? What federal interest survives? Is it assumed only eminent domain is preempted? If so, is it because a state judicial system cannot be trusted to ascertain just compensation? It is the ICC, however, and not state courts, that lacks valuation experience.

E. Only parochial interests are served by the decision

This decision serves no federal regulatory interest, as witnessed by the federal government's position here. It jeopardizes state prerogatives, as witnessed by the active involvement of the states. It serves no interest of the Association of American Railroads. (Jur. St. Ap. 11.)

This decision serves only the parochial interests of a single carrier that apparently wishes to remove the

track, thereby obstructing the state and federal interest to restore service.

SUMMARY OF ARGUMENT

The decision below declares that Congress has preempted the state power of eminent domain. Eminent domain, however, is an essential attribute of state sovereignty which can be preempted, if at all, only under the clearest of conflict with federal law.

No such conflict appears here. In fact, the programs are in harmony. The federal interest lies in controlling the conditions under which a rail carrier may abandon service. Once that service is abandoned, no federal regulatory interest in the rail line survives. It is federal policy, however, to encourage states to fill the void by developing programs to restore local rail service.

The decision below denies the use of eminent domain to pursue the federal policy of restoring local rail service through state programs. In so doing, the court has both frustrated federal policy and invaded an essential attribute of state sovereignty.

CONCLUSION

It is respectfully submitted that this Court should reverse.

Respectfully Submitted,

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